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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: *MTB*
DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICARDO J. BUSTAMANTE,
CDCR #AC-7291,

Plaintiff,

vs.

ARMY AND NAVY ACADEMY, et.al.,

Defendants.

Civil No. 10cv1140 W (WMC)

ORDER:

(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
[Doc. No. 2]; AND

(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING
TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A

Ricardo Bustamante ("Plaintiff"), a state inmate currently incarcerated at the Richard J. Donovan Correctional Facility located in San Diego, California and proceeding pro se, has filed a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

I.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee

1 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
2 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
3 remains obligated to pay the entire fee in installments, regardless of whether his action is
4 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
5 (9th Cir. 2002).

6 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a
7 prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account
8 statement (or institutional equivalent) for the prisoner for the six-month period immediately
9 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
10 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
11 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
12 (b) the average monthly balance in the account for the past six months, whichever is greater,
13 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
14 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
15 of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and
16 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
17 § 1915(b)(2).

18 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
19 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
20 Plaintiff's trust account statement shows he has insufficient funds with which to pay any initial
21 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be
22 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
23 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing
24 fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"
25 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack
26 of funds available.").

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1 Therefore, the Court GRANTS Plaintiff's Motion to Proceed IFP [Doc. No. 2], and
 2 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
 3 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court
 4 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

5 II.

6 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

7 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 8 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
 9 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 10 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 11 practicable after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 12 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
 13 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 14 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 15 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 16 (§ 1915A); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 17 § 1915A).

18 "[W]hen determining whether a complaint states a claim, a court must accept as true all
 19 allegations of material fact and must construe those facts in the light most favorable to the
 20 plaintiff." *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 21 "parallels the language of Federal Rule of Civil Procedure 12(b)(6)"). In addition, the Court's
 22 duty to liberally construe a pro se's pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
 23 839 F.2d 621, 623 (9th Cir. 1988), is "particularly important in civil rights cases." *Ferdik v.*
 24 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
 25 pro se civil rights complaint, the court may not "supply essential elements of claims that were
 26 not initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
 27 Cir. 1982). "Vague and conclusory allegations of official participation in civil rights violations
 28 are not sufficient to withstand a motion to dismiss." *Id.*

1 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
 2 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
 3 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
 4 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
 5 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
 6 1350, 1354 (9th Cir. 1985) (en banc).

7 Here, Plaintiff fails to allege any act on the part of Defendants which were taken “under
 8 color of state law.” *See* 42 U.S.C. § 1983, 28 U.S.C. § 1915(e)(2)(B)(ii). Private parties do not
 9 generally act under color of state law; thus, “purely private conduct, no matter how wrongful,
 10 is not within the protective orbit of section 1983.” *Ouzts v. Maryland Nat’l Ins. Co.*, 505 F.2d
 11 547, 550 (9th Cir. 1974); *see also Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). While
 12 a plaintiff may seek to hold a private actor liable under section 1983, he must allege facts that
 13 show some “state involvement which directly or indirectly promoted the challenged conduct.”
 14 *Ouzts*, 505 F.2d at 553; *West v. Atkins*, 457 U.S. 42, 49, 54 (1988); *Johnson v. Knowles*, 113
 15 F.3d 1114, 1118-1120 (9th Cir. 1997). In other words, Plaintiff must show that the private
 16 actor’s conduct is “fairly attributable” to the government. *Rendell-Baker v. Kohn*, 457 U.S. 830,
 17 838 (1982); *see also Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 567 (9th Cir.
 18 1987).

19 Here, Plaintiff’s Complaint fails to allege facts sufficient to show that any of the named
 20 Defendants acted on behalf of, or in any way attributable to, the state. Thus, without more,
 21 Plaintiff’s allegations against these Defendants fail to satisfy the first prong of a § 1983 claim.
 22 *See Haygood*, 769 F.2d at 1354.

23 III.

24 CONCLUSION AND ORDER

25 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

26 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
 27 is **GRANTED**.

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2. The Secretary of California Department of Corrections and Rehabilitation, or his designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the trust account in an amount equal to twenty percent (20%) of the preceding month's income credited to the account and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento, California, 94283-0001.

IT IS FURTHER ORDERED that:

4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A. However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is filed in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

5. The Clerk of Court is directed to mail a court approved § 1983 form complaint to Plaintiff.

DATED: 7/2/10


HON. THOMAS J. WHELAN
United States District Court